JUN 2 3 195

Supreme Court of the United States

OCTOBER TERM, 1956

No. 203

GUY R. PEZZNOLA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT;

SAME *v.* SAME.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PAUL T. SMITH
REUBEN GOODMAN
209 Washington Street
Boston 8, Massachusetts
Attorneys for Petitioner.

Of Counsel
MANUEL KATZ
JOSEPH T. DOYLE

Blanchard Printing Company, Boston, Mass. — Law Printers

SUBJECT INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute and Rule Involved	3
Statement of the Case	4
Argument	5
Question I. The Scope of Section 145(b) of the Internal Revenue Code of 1939	5
Question II. The Charge to the Jury	10
Conclusion	15
Appendix A (Opinions of the United States Court of Appeals for the First Circuit)	16
Dissenting Opinion	16
Majority Opinion	29
Opinion on Petition for Rehearing	31

Cases.

Berra v. *United States*, 351 U.S. 151	9
Bihn v. *United States*, 328 U.S. 633	13
Bishop v. *United States*, 8 Cir., 16 F.2d 406	13
Bollenbach v. *United States*, 326 U.S. 607	13
Burton v. *United States*, 196 U.S. 283	14
Calderon v. *United States*, 5 Cir., 279 F. 556	15
Cave v. *United States*, 8 Cir., 159 F.2d 464	9
Cenedella v. *United States*, 1 Cir., 224 F.2d 778	10
Coleman v. *United States*, 5 Cir., 167 F.2d 837	14
Douglass & Manderille v. *M'Allister*, 3 Cranch. 298	14
Gaunt v. *United States*, 1 Cir., 184 F.2d 284	8n, 10
Gold v. *United States*, 3 Cir., 102 F.2d 350	15
Holland v. *United States*, 348 U.S. 121	9
Kotteakos v. *United States*, 328 U.S. 750	13
McFarland v. *United States*, D.C.Cir., 174 F.2d 538	13

Page

Mills v. *United States*, 164 U.S. 644 13
Patterson v. *United States*, 5 Cir., 183 F.2d 687 13
Lydia Pinkham Medicine Company v. *Gove*, 305 Mass. 213 6
Roosevelt v. *Hamblin*, 199 Mass. 127 6
Schneider v. *United States*, 3 Cir., 192 F.2d 498 13
Spies v. *United States*, 317 U.S. 492 . . . . . 8, 9, 10
Taylor v. *United States*, 9 Cir., 179 F.2d 640 . . . . . 8n
Thomas v. *United States*, 6 Cir., 151 F.2d 183 13
United States v. *Alper*, 2 Cir., 156 F.2d 222 15
United States v. *Beacon Brass Co.*, 344 U.S. 43 8
United States v. *Croessant*, 3 Cir., 178 F.2d 96 9
United States v. *Cumberland*, 3 Cir., 200 F.2d 609 13
United States v. *Donnelly*, 7 Cir., 179 F.2d 227 13
United States v. *Johnson*, 319 U.S. 503 8
United States v. *Marcus*, 3 Cir., 166 F.2d 497 15
United States v. *Martell*, 3 Cir., 199 F.2d 670 13
United States v. *Raub*, 7 Cir., 177 F.2d 312 13
Wolfle v. *United States*, 291 U.S. 7, 12 10

STATUTES AND RULES.

28 U.S.C. sec. 1254(1) 2
Internal Revenue Code of 1939, sec. 145(b) 53 Stat. 63 . . . . . 2, 3, 4, 8, 9, 13, 14
Internal Revenue Code of 1939 sec. 3616(a) 53 Stat. 440 9
Rules of Criminal Procedure, Rule 30 . . . . . 3, 14

MISCELLANEOUS.

Frankfurter, *Of Law and Men*, pp. 83-4 15
Peairs, *Business Corporations*, Massachusetts Practice Series, Vol. 13, p. 147 6

Supreme Court of the United States

OCTOBER TERM, 1956

No. .

GUY R. PEZZNOLA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT;

SAME *v.* SAME.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Guy R. Pezznola, by his attorneys, prays that a writ of certiorari issue to review the judgments entered in these cases on May 7, 1956, by the Court of Appeals for the First Circuit.

Opinions Below

The opinions in the Court of Appeals including the dissenting opinion of Judge Hartigan and the opinion on the

petition for rehearing are set out in Appendix A, page 16. They are as yet unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 7, 1956. The petitioner filed a petition for rehearing on May 22, 1956. The petition was denied on May 31, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

Questions Presented

I. Where a treasurer of a Massachusetts corporation signs a corporate income tax return which understates the corporation's income and the understatement is not in itself sufficiently substantial to justify an inference of wilful evasion, what, if any, additional evidence is necessary to sustain a conviction of the treasurer for wilfully and knowingly attempting to defeat and evade taxes due from the corporation by filing and causing to be filed a false and fraudulent tax return in violation of section 145(b) of the Internal Revenue Code of 1939.

II. Whether the defense of the petitioner who was treasurer of the corporation, that the other officer, the president, alone had knowledge of the falsity of the corporate return was adequately presented to the jury in view of the district court's refusal to give the petitioner's request for instruction that knowledge of another officer of the corporation could not be imputed to the petitioner and in view of the district court's charge regarding the petitioner's participation in the alleged evasion.

Statute and Rule Involved

Section 145(b) of Internal Revenue Code of 1939, 53 Stat. 63:

> "(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution."

Rule 30, Rules of Criminal Procedure:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Statement of the Case

The petitioner, Guy R. Pezznola, was indicted on July 9, 1954 and charged with wilfully and knowingly attempting to defeat and evade a large part of the income taxes owed by Guy's Super Service Garage Inc. for the fiscal year ending April 30, 1948 by filing and causing to be filed a false and fraudulent tax return which understated the corporation's net income and tax for that period—in violation of section 145(b) of the Internal Revenue Code of 1939. On August 9, 1954, a second indictment was returned charging him with the same crime with reference to the corporation's fiscal year ending April 30, 1949. At the same time a third indictment was returned against the petitioner charging him with wilfully and knowingly attempting to evade his personal income tax liability for the calendar year 1948.

The petitioner was treasurer of Guy's Super Service Garage Inc. and one Thomas J. Duggan was its president (Appendix A, page 17). Guy's Super Service Garage Inc. is a Massachusetts corporation (R. p. 7) [1] engaged in the sale of new and used automobiles and related products and services (Appendix A, page 17). The petitioner pleaded not guilty to all three indictments, and the three cases were tried together. At the close of the Government's evidence the petitioner filed motions for acquittal in all three cases. The motion for acquittal was allowed in the case involving the petitioner's individual income tax (R. p. 341) and denied in the two cases involving the tax of Guy's Super Service Garage Inc. (R. p. 339). The petitioner stood on his motions for acquittal and presented no evidence.

[1] R. refers to the petitioner's record appendix to its brief in the court below.

The petitioner was found guilty on both indictments, and motions for a new trial were denied. In the case involving the corporation tax return for the fiscal year ending April 30, 1948 he was sentenced to pay a fine of $2500.00 and to three months imprisonment. In the case involving the corporation tax for the fiscal year ending April 30, 1949 he was sentenced to three months imprisonment to run concurrently with the sentence in the other case. Sentence was stayed pending review.

The petitioner appealed to the Court of Appeals for the First Circuit which affirmed the judgments of the district court, Judge Hartigan dissenting. A petition for rehearing filed on May 22, 1956 was denied on May 31, 1956. The Court of Appeals stayed its mandate pending review in this Court.

Argument

I. The majority of the Court of Appeals sustained the conviction on the basis of the following evidence (Appendix A, page 29):

> "The defendant was sole proprietor of the enterprise known as Guy's Garage prior to its incorporation as Guy's Super Service Garage, Inc. His first name appears in the corporate title, he was an organizer of the corporation, he was a stockholder, and he was treasurer from its creation through the years here involved. He had access to the corporate records, and he with only Duggan, the president, now deceased, and Mrs. Simansky, the bookkeeper, had access to the cash drawer and the right to take cash therefrom. He signed the incorrect tax returns for the years in question, and in each of those years the net income actually earned by the corporation was over three

> times the amount of the net income reported. He also made some of the sales which were later understated on the corporate books. . . ."

The majority, however, states that it does not rely on any one of the enumerated factors to sustain a wilful attempt to evade (Appendix A, pp. 29-30). In this it is, of course, correct. An incorporator in Massachusetts has no connection with the corporation once it is organized. (*Roosevelt* v. *Hamblin,* 199 Mass. 127, 133). He merely "carries out the formal steps of actual incorporation." (Peairs, *Business Corporations,* Massachusetts Practice Series, volume 13, p. 147). The office of treasurer may be purely ministerial. In *Lydia E. Pinkham Medicine Company* v. *Gove,* 305 Mass. 213, 217, the court said:

> "Unless managerial powers are attached to it by vote or by course of conduct, the office of treasurer is ministerial. A treasurer is bound to disburse the corporate funds under and only under the orders of the directors or other officers in charge of the corporate books."

As the dissenting opinion points out (Appendix A, page 17):

> ". . . his [the petitioner's] chief duties were to serve as body repairman and mechanic. Thomas G. Duggan, president and likewise part owner of the corporation, was in charge of the office. He did no mechanical work of any kind. Although the defendant had access to the office records, there was no recollection on the part of Mrs. Ethel Simansky, bookkeeper for the corporation during the years involved, that the defendant had ever actually examined the books." (Cf. R. pp. 253-5.)

Similarly the evidence that the petitioner made some of the sales, later understated on the books of the corporation, is, as the dissenting opinion also points out (Appendix A, page 26), inadequate to prove that the petitioner had knowledge of the fraudulent character of the corporate books.[2]

Nor does the majority rely on the amount of the understatement as sufficient evidence of a wilful attempt to evade. The reason for that is clear. The net income for the fiscal year ending April 30, 1948 was reported as $6,873.32 (R. pp. 3, 293). The majority found that the net income actually earned was over three times the reported income making unreported income of something over $13,000.00.[3] Since this unreported income was due to understated sales transactions (Cf. list of exhibits p. 410 et seq.) it would be noticed by one signing a return only if it resulted in an extraordinarily low gross sales figure. But the gross sales here were reported as $287,308.72. (R. p. 291.) On the Government's case this figure should have been $301,918.72.[4] Obviously, as is implicit in the majority's decision, such a discrepancy is not a sufficient basis for a conviction of wilful evasion.

In the last analysis the majority predicates the petitioner's conviction on the evidence that he signed a false return plus an inference that he had a position of some importance in the corporation, which inference is based on evidence that the petitioner owned the business prior

---

[2] The tax returns were made from the books by a firm of accountants. (R. p. 276.)

[3] The indictment alleges an understatement of $14,610.00. As we compute it from the evidence, the understatement is $13,850.00 or $13,950.00.

[4] The figures for the fiscal year ending April 30, 1949 are of the same order of magnitude. The gross sales are reported as $388,937.54. (R. p. 295), and the net income is reported as $4,706.39. (R. p. 296, R. p. 4.)

to its incorporation, his first name appeared in its title, and he was a stockholder [5] and treasurer.[6] Moreover, the conviction is sustained in spite of the fact that the act of signing the return is not colorable from any gross and manifest understatement in the return.

The holding of the majority below thus crystallizes an issue which this Court has discussed with varying emphases. That issue is—to what extent and under what circumstances a person becomes criminally liable under section 145(b) of the Internal Revenue Code of 1939 by filing a false return.

In *Spies* v. *United States*, 317 U.S. 492 the Court held that the term "attempt" in section 145(b) implied "affirmative action" (at p. 498). The affirmative action, moreover, must, like the illustrations given by the Court, be of such a kind as to support an inference of wilfulness. What is thus required is an affirmative colorable act.

In *United States* v. *Johnson*, 319 U.S. 503, this Court reversed the Court of Appeals because it had treated an indictment under section 145(b) as though it charged the mere filing of a false return. This Court held this was error because "the false return filed on March 15th was only one aspect of what was a process of tax evasion." (at p. 514.)

However, the requirement of "affirmative action" or a "process of tax evasion" seems to be minimized in *United States* v. *Beacon Brass Company*, 344 U.S. 43, 46.[7]

---

[5] Duggan, the president, was also part owner. (R. pp. 148, 389.)

[6] The petitioner's access to the cash, mentioned in the majority opinion, followed from his position as treasurer. It should be emphasized in this connection that a verdict was directed in the case against the petitioner involving his individual return for the calendar year 1948. (R. p. 341.)

[7] But the Court cites with apparent approval, *Gaunt* v. *United States*, 1 Cir., 184 F. d 284 and *Taylor* v. *United States*, 9 Cir. 179 F.2d 640. In *Gaunt* v. *United States*, the defendant made out his own return, and the discrepancies were gross. In *Taylor* v. *United States*, the court

In *Holland* v. *United States*, 348 U.S. 121, the Court again noted the holding in *Spies* v. *United States*. In discussing the proof of wilfulness in a net worth case, the Court said (p. 125):

> "In addition, [the Government] asks the jury to infer wilfulness from this understatement when taken in connection with direct evidence of 'conduct the likely effect of which would be to mislead or to conceal.' *Spies* v. *United States*, 317 U.S. 492, 499." (Cf. p. 139).

In *Berra* v. *United States*, 351 U. S. 151, however, this Court again emphasizes that filing a false return may be a method of evasion punishable under section 145 (b). It seems to minimize the significance attached in *Spies* v. *United States* to the use of the word "attempt" in that section, for the word "attempt" does not occur in section 3616(a) of the 1939 Code, 53 Stat. 440, with which section 145(b) is compared.

In *Cave* v. *United States*, 8 Cir., 159 F.2d 464, and *United States* v. *Croessant*, 3 Cir., 178 F.2d 96, the courts have also held that filing a false return may be a method of evasion punishable under sec. 145(b), but they have felt themselves bound by the requirement in *Spies* v. *United States*, that the act—here the filing—should be of such a nature that a wilful attempt could be inferred from it. In both cases the courts found this requirement satisfied because the returns grossly understated the income and, in *United States* v. *Croessant*, included fictitious expenses. The nature of the return thus colored the affirmative act of filing it, and this act thus became a sufficient basis for a finding of a wilful attempt to evade. This would also seem

---

recognized the difference between "making and subscribing a false return" and "filing a false return" which involves a process of which signing is a part.

the ground for decision by the Court of Appeals for the First Circuit in *Gaunt* v. *United States,* 184 F.2d 284, and *Cenedella* v. *United States,* 224 F.2d 778.

But in the instant case the court goes far beyond its own holdings and those of the third and eighth circuits. Here the court does not, as indeed it cannot, find wilfulness from the substantiality of the understatement. Nor does it find it in any other act. Rather, the court relies on a variety of factors which add up, at the very most, to evidence that the petitioner was of some importance in the corporation.

This case is thus basically inconsistent with *Spies* v. *United States* for it does not require the Government to point out some affirmative colorable act—an "attempt". Under this decision a jury would be permitted to consider virtually any case against a corporate officer in which a return understating income has been signed by the officer. It is submitted that to the extent that this decision finds any justification in the opinions of this Court, such opinions require clarification. (Cf. *Wolfle* v. *United States,* 291 U.S. 7, 12). This extension of the scope of the jury may, it is submitted, under certain circumstances be quite as prejudicial to a defendant as a limitation of the right to a jury trial.

II. The Government's evidence in this case consisted primarily of a number of transactions between the corporation and thirty-two customers (17 in the fiscal year ending April 30, 1948 and 15 in the fiscal year ending April 30, 1949). Most of these bought single automobiles from the corporation. They testified as to the amounts they paid and the manner of payment. This varied, some paying by check, some by cash and some by cash and check. One of these customers, John J. Canane, testified that in the two years he consummated 28 transactions with the corporation paying by check and cash. (R. p. 212 *et seq.*, Exhibit 50-80, cf. R. p. 420 *et seq.*) The Government called Mrs.

Symansky, the bookkeeper for the corporation, who testified that most of these transactions were understated on the books of the corporation. She testified that the understatements were made on the instructions of one of the two officers, Duggan or the petitioner. But she could not say that the petitioner had so instructed her. (R. pp. 172, 175, 189, 205, 256; dissenting opinion Appendix A, pp. 18-26). The one series of transactions which indicated a pattern of understatement was the transactions with Canane who paid by check and cash, the transactions being entered on the books only to the amount of the check (R. p. 212 *et seq.*, pp. 248-253, Exhibit 50-80, p. 420 *et seq.*) But he testified that he paid the cash to Duggan. (R. pp. 218, 219, 226). Moreover, Duggan was in charge of the office while the petitioner was the mechanic and did the body work in the garage (R. pp. 253-5; dissenting opinion, Appendix A, page 17).

One of the crucial issues, therefore, was whether the petitioner knew of the understatements which the jury could have found were made by Duggan. The core of the petitioner's defense and one of the alternatives in this case which was indicated, if not required, by the evidence was that Duggan alone had engineered the understatements. To pose this alternative to the jury the petitioner requested the following instruction (R. p. 404) characterized by the court below as a correct proposition of law:

> "18. The knowledge of another employee or officer of Guy's Superservice Garage, Inc. that some of the sales were not included as part of the gross sales appearing in the company's tax returns cannot be imputed to the defendant."

The district court refused to give this instruction partly on the ground that it was covered in the general charge

regarding the petitioner's participation. (R. pp. 397-8.) This charge was as follows (R. p. 392):

> "You have also heard the testimony of the representative of the Canane Company of Worcester with respect to what has been referred to as payments under the table, cash payments over the price reflected in the bill of sale or certainly over the price recorded in the books of the corporation, I think is better.
>
> "Well, now, ask yourselves these questions: Were there discrepancies between the entries recorded in the books and the sales price to customers? Did the defendant knowingly participate in deliberately falsifying the entries in the books and make it appear less income from the sales was recorded than was actually received? Did he know the returns were false?
>
> "The defendant signed the two tax returns here involved the two tax returns for the years set out in the indictments.
>
> "The question, I repeat, here is: Did the defendant participate knowingly in filing a false return of the corporate income for the years in question?
>
> "Now one Thomas G. Duggan—I must mention this fact—signed the two corporate returns as president of the corporation. He is dead. He is not a defendant. We are not concerned with any charge against him in this particular case. *The defendant here made the corporate returns along with Duggan and he would be guilty of tax evasion if you find he participated with Duggan in filing a tax return or he knew the tax returns were false* with a purpose of evading a substantial amount of the taxes he knew the corporation should pay." (emphasis ours)

The error which infects this portion of the charge is

similar to and aggravates rather than remedies the error committed in refusing the petitioner's Request No. 18. In summarizing his charge on participation the court in the portion underlined presented the jury with two possibilities as a basis for conviction—either that he participated in filing a false return or that he knew the returns were false. The first alternative was, of course, clearly error. The mere signing with another of a false return without knowledge that it is false is obviously not sufficient for a conviction under section 145(b) of the Internal Revenue Code of 1939. But the court refused to withdraw this portion of the charge (R. p. 398).

Assuming the correctness of the earlier portion of the charge that *knowing participation* is required, this summarizing portion is clearly inconsistent with it. But where inconsistent instructions, one correct and one erroneous, are both left standing, this Court and the various Courts of Appeals have held that the possibility of confusion is so great that a reversal is required. *Bihn* v. *United States*, 328 U.S. 633; *Mills* v. *United States*, 164 U.S. 644; *United States* v. *Cumberland*, 3 Cir., 200 F.2d 609; *United States* v. *Martell*, 3 Cir., 199 F.2d 670, 672; *Schneider* v. *United States*, 3 Cir., 192 F.2d 498; *Patterson* v. *United States*, 5 Cir., 183 F.2d 687; *United States* v. *Donnelly*, 7 Cir., 179 F.2d 227; *United States* v. *Raub*, 7 Cir., 177 F.2d 312; *McFarland* v. *United States*, D.C.Cir., 174 F.2d 538, and cases cited at 539. *Thomas* v. *United States*, 6 Cir., 151 F.2d 183; *Bishop* v. *United States*, 8 Cir., 16 F.2d 406.

Furthermore, the instruction that knowing participation is required is itself erroneous. This in effect submitted to the jury the question of a conspiracy between Duggan and the petitioner, though no conspiracy was charged. *Kotteakos* v. *United States*, 328 U.S. 750. *Bollenbach* v. *United States*, 326 U.S. 607. *Bishop* v. *United States*, 8 Cir., 16 F.2d 406.

As pointed out in the dissenting opinion (Appendix A,

page 28), it seems clear that the jury was utterly confused, for after four hours of deliberation they returned and asked (R. p. 399) "Who is under indictment, Pezznola or Guy's Super Service Garage Inc.?" Such a question would, of course, be inconceivable had they clearly understood that the petitioner could be convicted only if he personally knew of the understatements. Nor did the further instruction of the court bring home to the jury the necessity for personal knowledge of the petitioner. Thus, he instructed them not that the petitioner personally must know, but (R. p. 399) "*if as an officer of the corporation* . . . the defendant did it wilfully". He stated (R. p. 400), "We are trying a case against the treasurer of the corporation, Pezznola."

There are, of course, other portions of the charge which set out generally the elements of the crime of tax evasion in violation of section 145(b). But if, as the court below holds, the petitioner were entitled to no more than that, the provision in Rule 30 of the Rules of Criminal Procedure for specific requests for instruction would be pointless. That a defendant is entitled to something more than a bare statement of the elements of the crime was stated by Chief Justice Marshall in *Douglass & Mandeville* v. *M'Allister*, 3 Cranch. 298 and is strikingly illustrated in *Burton* v. *United States*, 196 U.S. 283 where this Court reversed a lower court that had given requested instructions which it characterized as abstract but refused to withdraw this characterization when the jury returned during its deliberations for further instructions. Implicit in Rule 30 of the Rules of Criminal Procedure is the principle that a defendant is entitled to have his theory of the case and his defenses presented to the jury—not only the legal issues and defenses but the factual issues and defenses as well. This principle has been followed by Courts of Appeals in various circuits:

In *Coleman* v. *United States*, 5 Cir., 167 F.2d 837, the court held that the defendant was entitled to a specific

charge regarding bias where the record showed ill will and a specific instruction was requested. This was not cured by a general charge with reference to credibility. See also *Calderon* v. *United States,* 5 Cir., 279 F. 556, 558.

In *United States* v. *Alper,* 2 Cir., 156 F.2d 222, the court reversed a conviction for concealment of assets under the Bankruptcy Act because the court below refused to give a request for instruction that it is a preference but no concealment where assets are turned over to a bankrupt to pay a debt, that being the defense.

In *United States* v. *Marcus,* 3 Cir., 166 F.2d 497, 503, the court held that general instructions regarding reasonable doubt and the burden of proof did not obviate the need for a specific instruction that the Government's burden covers the defense of alibi where such a defense was made and such an instruction requested. See also, *Gold* v. *United States,* 3 Cir., 102 F.2d 350.

It is submitted that the proper administration of criminal justice requires that the approach of these courts rather than the approach of the court below in this case be established as correct in order that the provision for requests for instruction should fulfill its function of mitigating to some extent the tendency to abstraction in charging the jury. Frankfurter, *Of Law and Men,* pp. 83-4.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted:

PAUL T. SMITH
REUBEN GOODMAN
209 Washington Street
Boston 8, Massachusetts

Of Counsel:
MANUEL KATZ
JOSEPH T. DOYLE

Appendix A

United States Court of Appeals
For the First Circuit

No. 5060.

GUY R. PEZZNOLA,
PLAINTIFF, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 5061.

SAME *v.* SAME.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Reuben Goodman, with whom *Paul T. Smith*, *Manuel Katz* and *Joseph T. Doyle* were on brief, for appellant.
William J. Koen, Assistant U. S. Attorney, with whom *Anthony Julian*, United States Attorney, and *George H. Lewald*, Assistant U. S. Attorney, were on brief, for appellee.

May 7, 1956.

HARTIGAN, *Circuit Judge*. These are appeals by the defendant, Guy R. Pezznola, from judgments entered on June 20, 1955, in the United States District Court for the District of Massachusetts which sentenced the defendant in No. 54-195-F to imprisonment for a period of three months and to pay a fine of $2,500, the prison sentence to run concurrently with an identical term imposed upon the defendant in No. 54-236-F.

The two indictments No. 54-195-F and No. 54-236-F charge in substance that the defendant, treasurer of Guy's Super Service Garage, Inc., did wilfully and knowingly attempt to defeat and evade a large part of the taxes due and owing by the corporation to the United States of America for the fiscal years ending on April 30, 1948, and April 30, 1949, respectively, in violation of Section 145(b) of the Internal Revenue Code. 26 U.S.C. § 145. A third indictment, No. 54-237-F, subsequently withdrawn by the trial judge from the consideration of the jury, charged the defendant with the evasion of his personal income tax.

The evidence tended to establish the following facts. The defendant, Guy R. Pezznola, was treasurer and part owner of Guy's Super Service Garage, Inc., a Massachusetts corporation engaged in the sale of new and used automobiles. He transacted some sales in behalf of the corporation, but his chief duties were to serve as body-repairman and mechanic. Thomas G. Duggan, president and likewise part owner of the corporation, was in charge of the office. He did no mechanical work of any kind. Although the defendant had access to the office records, there was no recollection on the part of Mrs. Ethel Simansky, bookkeeper for the corporation during the years involved, that the defendant had ever actually examined the books.

The tax returns in question were prepared by a firm of accountants. There is no evidence that these returns do not accurately reflect the corporate books and accordingly it follows that any alleged deficiency must be explicable, if at all, in terms of the understatement of business transactions on the records of the corporation itself.

At the conclusion of the Government's evidence the defendant moved for judgments of acquittal, which motions were denied as to No. 54-195-F and No. 54-236-F. The defendant thereupon rested.

Defendant contends that the court below erred in denying these motions, because there was not sufficient evidence of wilful and knowing understatement of taxable income.

We turn, therefore, to a consideration of what evidence there may be in these cases tending to prove that the defendant had knowledge that the corporate books did not properly reflect the business transactions consummated by the corporation throughout the fiscal years ending on April 30, 1948, and April 30, 1949. It is entirely clear that the jury would be completely justified in finding that many of the bookkeeping entries represent substantial and systematic understatements. In this connection the Government relies heavily on the testimony of the bookkeeper, Mrs. Simansky. The Government contends here—and so represented to the jury below—that Mrs. Simansky's testimony was that both the defendant and Duggan had upon occasion instructed her to understate various transactions upon the books. If this contention was well founded, it would, of course, effectively dispose of defendant's claim that there was no evidence in these cases from which the jury could find beyond a reasonable doubt that the defendant had knowledge of the spurious character of the corporate records.

It is apparent that Mrs. Simansky was a reluctant witness. She testified in part:

"Q. And would the entire amount of the receipts from the sale go into that portion of the book, or into the purchase book, or where would it go, the receipts to the company? A. The sale of the car would go into car sales or used car sales.

"Q. Now, my question is when it was entered as a car sale, whether it be new or used, would the entire amount received as a result of that sale be entered in any portion of your books of account? A. I believe it would be entered in the cash receipts.

"Q. In its entire amount? A. If it was paid for all at once, it would be."

Subsequently, after Mrs. Simansky had been questioned regarding particular entries, the Government's examination took the following form.

"Q. Then let me ask you this: if the invoice was for 1750 and you recorded 1350 on sales, where did the other $400 go to?

* * *

"The Court: Was it the way you did it? In other words, if you got $1200 for a car, you put it in that book?

"The Witness: Yes.

"Q. As $1200? A. As $1200.

"Q. And that would conform with the invoice and bill of sale if that is what was received, correct? A. Well, it is hard to answer that question after what I have seen.

* * *

"Q. On the transaction I was just discussing with you, the sales price was what, according to the invoice? A. I don't remember which one we were discussing.

"The Court: Show her the invoice, please.

(Mr. Koen complied)

"The Witness: Well, in the book I have 1350, and on the bill of sale I have 1750.

"The Court: Then you didn't enter the price of the car as reflected in that bill of sale in the books?

"The Witness: No.

"The Court: Why didn't you do that?

"The Witness: I can't answer. I don't know why I did it.

"Q. Were you told to enter $1350, Miss? A. I don't remember if it was.

"Q. At any time covering any of these transactions were you told to enter a sum other thar appeared on the face of the invoice? A. I can't answer that; I don't remember."

After a series of similar questions pointing towards substantial understatements, Mrs. Simansky was questioned as follows:

"Q. All right. Mrs. Symansky, you said in answer to the Court's question it might be money turned back to somebody in the office. Besides yourself and Mr. Pezznola and Mr. Duggan was there anybody else in the office to whom that money might be turned back? A. No, there wasn't.

"Q. Did it go to you? A. No, it didn't.

"Q. Did any of the moneys which have been reflected in the prior invoices and sales go to you? A. No, they never did.

"Q. So they went to either Mr. Pezznola or Mr. Duggan?

"Mr. Smith: I object.

"The Court: Well, if it went to somebody in the office—

"Q. It went to somebody in the office? A. Yes, that's right.

"Q. Did it go to Mr. Pezznola on some occasions? A. I couldn't remember.

"Q. Did it go to Mr. Duggan on some occasions? A. I couldn't remember.

"Q. But if it went to anybody in the office it went to either Mr. Pezznola or Mr. Duggan? A. Yes, that's right.

"Q. And that is true of the transactions that I was asking you about yesterday? A. Yes."

Somewhat later she was questioned concerning an era-

sure which was observable upon one of the Greenberg documents.

"Q. Fine. In view of the fact it is entered on the slip which Mr. Pezznola made out for $2,000, and in view of the fact the entry in the book is $1500 from sales receipts, can you tell us, if that was erased, at which [sic] instructions you erased it?

"Mr. Smith: I object.

"The Court: It may be put.

"A. I don't remember.

"Did you do it on your own, Miss?

"Mr. Smith: I object, unless there is some evidence.

"The Court: It may be put.

"A. Would you repeat that, please?

"The Court: Did you make that decision to make the erasure?

"The Witness: No, I didn't.

"Q. And who in the organization would give you instructions to make an erasure if such instructions were given? A. It would be either Mr. Duggan or Mr. Pezznola.

"Q. Can you help us as to which of the two gave you specific instruction to make that erasure and change? A. No, I couldn't."

With respect to the Rubenstein transaction her testimony was similar.

"Q. Having in mind the invoice reads $850, Miss, the entry on that, as it now stands, the final entry, is $400; is that correct? A. Yes.

"Q. Have you any memory as to striking out, first, the $100 and striking out the $850, which appear there? A. No, I can't recall.

"Q. Would you have done that on your own, Miss, on your own responsibility? A. No, I wouldn't.

"Q. Who in the corporation would give you instructions with reference to those delineations? A. It would be either Mr. Duggan or Mr. Pezznola.

"Q. Have you any memory, Miss, as to which of the two it was on this occasion? A. No, I don't."

Subsequently, she testified as follows:

"Q. Now, Mrs. Symansky, I will relieve you of that book, if I may. Thank you. We have asked you questions concerning several or many transactions, Miss, where the entry on the sales record is at variance with the amount which appears on the face of the invoice. Correct? A. That is right.

"Q. Now I think you testified earlier that the normal procedure would be to enter in the sales book the amount of the invoice, appearing on the invoice; correct? A. Yes.

"Q. Now, with particular reference to those transactions that we have discussed where the entry in the sales book differs from the amount appearing on the face of the bill of sale or the invoice, did you make those entries which are not in conformity with the amount appearing on the face of the invoice on your own decision? A. No, I did not.

"Q. Did you make them under the instructions of somebody connected with the corporation? A. Yes, I did.

"Q. Can you help us as to the name of *the person* who gave you instructions to record them in the amounts that have been entered in the books? (Italics ours) A. Yes.

"Q. Who gave you such instructions or directions? A. Mr. Duggan or Mr. Pezznola."

Subsequent cross-examination took the following form:

"X-Q. Now I think Mrs. Simansky, that you testified as to a series of entries that you made upon the

books which constitute some seventy or eighty government exhibits, is that correct? A. That's right.

"X-Q. If I am wrong, you correct me. Whether or not the Court asked you on one occasion if you had received instructions from Mr. Pezznola with respect to making that particular entry?

"The Court: I think the District Attorney asked that question. I may have. It makes no difference at all. Now, what is the question?

"The Witness: Well, he did not just say Mr. Pezznola, he asked who and I said it was either Mr. Duggan or Mr. Pezznola.

"X-Q. And then if I remember it you said you could not remember, is that correct? A. That I don't remember.

"X-Q. Did you testify that you could not remember as to whether either one of them have given you a specific instruction, isn't that correct? A. I said either one of them, either Mr. Duggan or Mr. Pezznola.

"X-Q. But you couldn't remember whether it was? A. I couldn't say either one of them."

After a careful review of Mrs. Simansky's testimony I have come to the conclusion that it is not capable of an interpretation which would support the Government in its contention. I believe that Mrs. Simansky's testimony went no farther in substance than this: "The initiative for these understatements must of necessity have come from Pezznola, Duggan, or myself and it did not come from me."

Nowhere in her testimony did Mrs. Simansky make the affirmative assertion that sometimes Pezznola instructed her in these matters and sometimes Duggan. What she did say was that she had no memory as to particular transactions and the Government seizes upon these statements seeking to enlarge them by drawing the inference that she had a more general memory implicating the defendant

which was limited only inasmuch as it could not be related to specific transactions. I believe that it is not possible to draw any such inference from her testimony. First of all, on one occasion, she specifically declined to testify that she had any such general memory implicating the defendant.

"Q. Did it go to Mr. Pezznola on some occasions?
A. I couldn't remember.

"Q. Did it go to Mr. Duggan on some occasions?
A. I couldn't remember."

If the only defect in Mrs. Simansky's memory of these matters related to a mere inability to connect known guilt to specific transactions, she could have indicated as much by an affirmative answer to these questions which in no way called for a memory of individual transactions. This she refused to do.

Still further, I think it is clear from the record that Mrs. Simansky went no farther in the direction of incriminating either the defendant or Duggan than she was forced to go by the undeniable facts and the necessity of exculpating herself from liability for the understatements. After testifying that the entries were properly recorded she was forced by questions directed towards specific entries in the books to acknowledge that they were not properly recorded; but she could not account for the reasons for these discrepancies. She was then forced to admit that only three persons could be responsible, Pezznola, Duggan and herself. Accordingly, she testified it must have been either Pezznola or Duggan because she would not make such entries on her own initiative. This was the limit to which the ammunition in the Government's arsenal could force her to go. In view of the obvious reluctance of the witness, her express refusal to testify at one time that she had a memory which would implicate the defendant "on some occasions," it seems to me clearly impossible to infer that she went one step farther than the Government could

push her and gratuitously added the additional elements of evidence which the Government purports to find in her testimony.

During the trial there was some confusion as to the import of her testimony, but the trial judge seems to have agreed that she had no memory which would implicate either Duggan or the defendant.

> "Mr. Koen: Mr. Smith says that there is only one piece of testimony and that was with reference to the $200 from Galagher or Geller. My memory is that there is another piece of evidence from Steinberg which shows money going into Pezznola in addition. There is this testimony with reference to the books Mrs. Simansky testified here that her directions came both from Pezznola and Duggan on the understatements.
>
> "Mr. Smith: No such thing. She said 'from either.' There is a difference.
>
> "The Court: But she included both, but as to the specific instructions she didn't know which.
>
> "Mr. Smith: She said 'from either one.'
>
> "The Court: That's the same thing.
>
> "Mr. Smith: No. It could have been from either, she said.
>
> "The Court: Tweedle-dum and tweedle-dee. She said it could have been either Pezznola or Duggan, but she couldn't tell which one. Leave it to the jury. I'm not going to be bothered about that."

If this was the true import of her testimony then I believe the trial judge was incorrect in his view that this was a proper matter for jury interpretation. If Mrs. Simansky, as I believe, said no more than this—"It had to be Pezznola, Duggan or I and it wasn't I," then her testimony afforded no evidentiary basis upon which the jury could properly make a determination as to the guilt

of the defendant. If left to the jury, such a question could be resolved only by flipping a coin or some other fortuitous device.

In the absence of other evidence tending to prove that the defendant had knowledge of the fraudulent character of the corporate books, I believe this case should not have been submitted to the jury. I have analyzed the record, and with only two exceptions—the Geller and Steinberg transactions—the Government's evidence either shows no connection with the defendant or at best merely that the defendant made certain sales correctly stated on the invoice which were subsequently understated or omitted on the books by some unknown person, either Duggan or himself. Such evidence is clearly inadequate.

Upon analysis the Geller transaction shows nothing to indicate that the invoice was understated, but merely that Geller paid $200 more than he thought the car was worth. Apparently this transaction was subsequently understated on the books, but as in all of these transactions there is nothing to show that the defendant was instrumental in making such understatements.

Steinberg testified that he paid $2325 to the defendant and received a bill of sale "if I were to trust my memory, I would say somewhere in the vicinity of $2000." He was cross-examined as follows:

> "X-Q. Do you have to rely upon a record in order to remember? A. Yes, sir.
>
> "X-Q. And so that you would have to rely upon the record in order to remember what the price was on the invoice, is that right? A. Yes, sir.
>
> "X-Q. So that you don't have any independent memory of what the price was on the invoice, do you? A. Not exactly, sir, no, sir.
>
> "X-Q. So that you can't give us your best memory, can you? A. I can give you my best memory.

"X-Q. You can't give us your best memory of who you sold it to? A. I wouldn't begin to try to remember.

"X-Q. Don't you have books and records? A. Yes, sir.

"X-Q. Don't your books and records show the purchase of this automobile? A. It certainly does.

"X-Q. Don't your books and records show the sale of the automobile? A. They certainly do.

"The Court: You didn't bring them with you?

"The Witness: That's right.

"The Court: You have them at home or at the office?

"The Witness: Yes.

"The Court: You can produce them?

"The Witness: Yes, sir.

"The Court: If you want them, Mr. Smith, he will have them.

"X-Q. Well, will you produce them this afternoon? A. Glad to, sir."

The record does not disclose that Steinberg produced his books and records concerning this transaction.

This is the sum and substance of the evidence against the defendant. Under these circumstances I believe the trial judge should have directed judgments of acquittal. In *Kassin* v. *United States,* 87 F.2d 183 (5 Cir. 1937) at 184, the court said:

"• • • In each case, however, where the evidence is purely circumstantial, the links in the chain must be clearly proven, and taken together must point not to the possibility or probability, but to the moral certainty of guilt. That is, the inferences which may reasonably be drawn from them as a whole must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence."

It is entirely possible, though not probable, in the light

of all the evidence, that Duggan was responsible for every understatement on the books and that the defendant was without knowledge of what was going on. Duggan was dead at the time of the trial. " * * * Since an essential link is missing, the United States has failed to establish its case * * *. There is strong probability that (he) was guilty but the guilt of a defendant must be proved, not merely vehemently suspected in order to sustain a conviction." *United States* v. *Stefanowicz*, 177 F.2d 189 (3 Cir. 1949). The evidence in this case is not inconsistent with the possibility that Duggan alone was guilty.

All ambiguity with respect to the testimony of Mrs. Simansky could have been easily cleared up if the Government had seen fit to ask her one simple question: "Without reference to specific transactions, do you have any memory that the defendant ever at any time instructed you to understate the books of the corporation?" Possibly the Government was afraid to ask this question. In any event it did not, but contented itself with an attempt to draw the inference favorable to its case without risking the disaster which would have resulted from a negative response to such a question.

Since the import of Mrs. Simansky's testimony could have been readily clarified in this manner and since the Government neglected to seek any such clarification, I believe that the Government failed to carry its burden of proof and that there was insufficient evidence to take this case to the jury.

Perhaps it should be noted here that at the termination of a seven day trial and after four hours of deliberation, the jury asked the court the following question: "Who is under indictment, Pezznola or Guy's Super Service, Incorporated?"

Nothing that the jury could ask at this late date in the trial could indicate better the jury's utter confusion. The indictment against Pezznola relating to his personal in-

come tax had already been withdrawn by the court from the jury's consideration. Guy's Super Service Garage, Inc. was not under indictment—perhaps it should have been. I am convinced that the jury thought that the corporation should have been indicted and it disregarded the lack of evidence against the defendant in order to reach a compromise verdict based upon its belief that some one ought to pay for the corporation's misdeeds. Pezznola as treasurer was the only target at which to aim since Duggan, the corporation's president, who also signed the tax returns, was dead.

For the foregoing reasons I would reverse the judgments of the district court and remand the cases to that court with direction to enter judgments of acquittal. However, my colleagues are of a different opinion.

WOODBURY, *Circuit Judge*, (with whom MAGRUDER, *Chief Judge*, concurs). The defendant was sole proprietor of the enterprise known as Guy's Garage prior to its incorporation as Guy's Super Service Garage, Inc. His first name appears in the corporate title, he was an organizer of the corporation, he was a stockholder, and he was treasurer from its creation through the years here involved. He had access to the corporate records, and he with only Duggan, the president, now deceased, and Mrs. Simansky, the bookkeeper, had access to the cash drawer and the right to take cash therefrom. He signed the incorrect tax returns for the years in question, and in each of those years the net income actually earned by the corporation was over three times the amount of net income reported. He also made some of the sales which were later understated on the corporate books. Perhaps none of these things standing alone would sustain a conviction. Together, however, they seem to me clearly to warrant the conclu-

sion that Pezznola was not a mere mechanic employed by the corporation, or as its treasurer was a mere figurehead, but instead was an active, participating, corporate officer of managerial rank who signed the returns knowing full well that they were false and fraudulent.

Moreover, the above matters provide an illuminating background against which to view Mrs. Simansky's testimony. From the record it is very evident that Mrs. Simansky was not only a reluctant but also an evasive witness. I cannot agree that on the written record her testimony is not susceptible of the interpretation that, although she could not remember in any given transaction whether Duggan or Pezznola directed her to make a false entry, each one of them did so on various occasions. Her reluctance to be specific does not affect this view, for this is not a case of a single isolated incident of falsification which might be lost in the haze of memory. There were nearly eighty falsified transactions on the corporation's books. Her very choice of the alternative method of expression indicates to me that both Pezznola and Duggan were involved. I can hardly believe that she would have even mentioned Pezznola's name, either in the alternative or otherwise, if he had never given her any direction to falsify the corporation's books. Furthermore, even if her involved words when printed are susceptible of differing interpretations, their meaning when uttered, because of their complexity born of her obvious reluctance and evasiveness, depended in unusual degree upon intonation and demeanor observable to the trial judge and jury but not to us.

In this situation I conclude that there was sufficient evidence for the jury to find beyond a reasonable doubt that the defendant wilfully and knowingly attempted to defeat and evade taxes due from Guy's Super Service Garage, Inc.

The judgments of the District Court are affirmed.

United States Court of Appeals
For the First Circuit

No. 5060.

GUY R. PEZZNOLA,
PLAINTIFF, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 5061.

SAME *v.* SAME.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Paul T. Smith, *Reuben Goodman*, *Manuel Katz* and *Joseph T. Doyle* for appellant on petition for rehearing.
(*Anthony Julian*, United States Attorney, and *William J. Koen* and *George H. Lewald*, Assistant U. S. Attorneys, for appellee.)

OPINION OF THE COURT
ON PETITION FOR REHEARING.
May 31, 1956.

WOODBURY, *Circuit Judge*. The appellant has petitioned for rehearing on the ground that his assertions of error in the trial court's charge to the jury must have been overlooked because they were not mentioned anywhere in this court's opinion. This is not so. Judge Hartigan did not have occasion to consider the charge in the view he took of the case and Chief Judge Magruder and I considered

the assertions of error only to reject them. One sentence of the charge considered out of context might perhaps be interpreted as an erroneous statement of an applicable principle of law. But considering the sentence in its context, such an interpretation would be so far fetched that we did not think there was any practical probability of misinterpretation by the jury. Furthermore, it does not appear that counsel took exception to the sentence at the conclusion of the charge. Rule 30, F. R. Cr. P. The charge as a whole impressed us as eminently fair and any possible technical error in it so minor as not to affect substantial rights of the accused. We therefore treated the error, if in fact there was any error at all, as harmless, and disregarded it in accordance with Rule 52(a) of the Federal Rules of Criminal Procedure. Error was also pressed on failure of the court to give a certain requested charge, which, while it contained an abstractly correct proposition of law, was so adequately covered in the general charge as to preclude the possibility of prejudice.

The petition for rehearing is denied.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and rule involved	2
Statement	3
Argument	6
Conclusion	11

CITATIONS

Cases:

Armstrong v. *United States*, 228 F. 2d 764, certiorari denied, 351 U. S. 918	10
Canton v. *United States*, 226 F. 2d 313, certiorari denied, 350 U. S. 965	8
Cave v. *United States*, 159 F. 2d 464, certiorari denied, 331 U. S. 847, rehearing denied, 332 U. S. 786	7
Clark v. *United States*, 211 F. 2d 100, certiorari denied, 348 U. S. 911	8
Gaunt v. *United States*, 184 F. 2d 284, certiorari denied, 340 U. S. 917, rehearing denied, 340 U. S. 939	7, 10
Holland v. *United States*, 348 U. S. 121, rehearing denied, 348 U. S. 932	6
Jolly v. *United States*, 229 F. 2d 180, certiorari denied, June 4, 1956	10
Rutkin v. *United States*, 343 U. S. 130, rehearing denied, 343 U. S. 952	8
Samish v. *United States*, 223 F. 2d 358, certiorari denied, 350 U. S. 848, rehearing denied, 350 U. S. 897	10
Smith v. *United States*, 348 U. S. 147	6, 7
Spies v. *United States*, 317 U. S. 492	7, 8
United States v. *Beacon Brass Co.*, 344 U. S. 43	6
United States v. *Burdick*, 214 F. 2d 768, remanded, 348 U. S. 905, reaffirmed, 221 F. 2d 932, certiorari denied, 350 U. S. 831	8
United States v. *Calderon*, 348 U. S. 160	7

293052—56——1

Cases—Continued

	Page
United States v. *Croessant*, 178 F. 2d 96, certiorari denied, 339 U. S. 927	6
United States v. *Rosenblum*, 176 F. 2d 321, certiorari denied, 338, U. S. 893	7
Watts v. *United States*, 212 F. 2d 275, remanded, 348 U. S. 905, reaffirmed, 220 F. 2d 483, certiorari denied, 349 U. S. 939	8, 10
Statute:	
Internal Revenue Code of 1939, Sec. 145(b) (26 U. S. C. 1952 ed., Sec. 145(b))	2
Miscellaneous:	
Federal Rules of Criminal Procedure, Rule 30	2–3, 9

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 203

GUY R. PEZZNOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority opinion of the Court of Appeals (Pet. 29–30) affirming the judgments of conviction, the dissenting opinion (Pet. 16–29), and the opinion of the Court of Appeals denying the petition for rehearing (Pet. 31–32), are reported at 232 F. 2d 907.

JURISDICTION

The judgments of the Court of Appeals were entered on May 7, 1956, and a petition for rehearing was denied on May 31, 1956. (Pet. 16, 31.) The petition for certiorari was filed on June 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the evidence of willful attempts to evade income taxes was sufficient to sustain the jury's verdict.

2. Whether the issue of petitioner's knowledge of the falsity of the corporate income tax returns was adequately covered in the trial court's instructions to the jury.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b).)

Federal Rules of Criminal Procedure:

> RULE 30. INSTRUCTIONS
>
> At the close of the evidence or at such earlier time during the trial as the court reasonably

directs, a
that the c
set forth
copies of
adverse p
sel of its
prior to t
court sha
ments are
error any
therefrom
jury retir
tinctly the
grounds o
given to m
of the ju

ny party may file written requests
ourt instruct the jury on the law as
in the requests. At the same time
such requests shall be furnished to
arties. The court shall inform coun-
proposed action upon the requests
heir arguments to the jury, but the
l instruct the jury after the argu-
completed. No party may assign as
portion of the charge or omission
unless he objects thereto before the
s to consider its verdict, stating dis-
matter to which he objects and the
f his objection. Opportunity shall be
ake the objection out of the hearing
ry.

STATEMENT

On July 9, 19
54, one indictment, and on August 9,
1954 (R. 1–2),
wo additional indictments,[1] were re-
turned against
petitioner in the United States Dis-
trict Court for t
he District of Massachusetts charging
that he had will
fully attempted to evade and defeat
income taxes by
filing and causing to be filed false
and fraudulent
income tax returns, in violation of
Section 145 (b)
of the Internal Revenue Code of
1939.

As treasurer of Guy's Super Service Garage, Inc., a corporation, petitioner was charged in indictments

[1] The last of the three indictments, No. 54–237–F, charging petitioner with willful attempt to evade his personal income tax, is not included in the printed record. At the close of all the evidence petitioner made a motion for judgment of acquittal which was granted as to this indictment (R. 1, 2, 341) and denied as to the other two indictments (R. 339, 402).

No. 54–195–F and No. 54–236–F with willful attempt to evade the corporation's income tax for the fiscal years ended April 30, 1948, and April 30, 1949. The amounts of income and the taxes due thereon, as reported in the corporate returns and as corrected, were alleged to be as follows (R. 3–5):

Fiscal year ended—	Reported		Corrected	
	Income	Tax	Income	Tax
Apr. 30, 1948	$6,873.32	$1,480.85	$21,483.32	$4,870.83
Apr. 30, 1949	4,706.39	988.34	17,281.44	3,874.73

The cases were consolidated and on May 19, 1955, after a jury trial lasting seven days (R. 1, 2), petitioner was found guilty as charged (R. 400–401). On May 31, 1955, the trial court denied a motion for a new trial. (R. 405–406.) Petitioner was sentenced to imprisonment for a period of three months and fined $2,500. (R. 406–407.) The Court of Appeals affirmed. (Pet. 29–30.)

The evidence to support the verdict may be summarized as follows:

For many years petitioner was sole proprietor of a business involving the sale and repair of automobiles. On June 4, 1946, this business was incorporated under the name of Guy's Super Service Garage, Inc. Petitioner was an organizer of the corporation, and was treasurer and a stockholder through the years involved. He had access to the corporate records, and he with Duggan, the president, now deceased, and Mrs. Simansky, the bookkeeper, had access to the cash drawer and the right to take cash from it. Petitioner signed both returns as treasurer of

the corporation. (Ex. 2, 3; R. 6–8, 45, 117, 148, 205–206, 212, 366, 389, 393, 410.)

At the trial the Government established by direct evidence unreported income received by the corporation through sales of nearly eighty automobiles to some twenty-seven customers, more than half of whom dealt directly with petitioner. (R. 12, 18, 24, 46, 69, 71, 72, 85, 88, 97, 106, 107, 110, 115–117.) The unreported income attributed to the corporation through these sales arose out of three general types of transactions:

(1) Sales at prices exceeding the price specified on the invoice issued to the respective purchaser. Usually the excess of the actual price over the invoice price was received in the form of cash. (R. 212–245.) These side payments were not recorded on the corporate books. (R. 247–252.)

(2) Invoice issued to purchaser reflected the actual selling price but the sale was entered on the corporate books at a lower figure than reflected by the sales invoice. (R. 152–180.)

(3) Invoice selling price corresponded with the actual selling price but returns were omitted entirely from the corporate books. (R. 180, 181, 182, 199.)

Sales transacted by petitioner were repeatedly understated in the corporate records. A few examples may be given. On July 30, 1947, petitioner sold a 1947 De Soto for $2,325 in cash and gave the buyer an invoice in the sum of $2,000. (R. 18–19.) On October 14, 1947, he agreed to sell a 1946 Pontiac for $2,000. The customer left a $100 deposit and on the following day gave petitioner a check for the

balance of $1,900). The receipt slip for the $1,900
was erased and th e letter "4" inserted so as to read
$1,400. The boo kkeeper recorded this as a $1,500
sale. (Ex. 35, 36 ; R. 97–98, 171–175.) On or about
September 3, 194 8, petitioner sold a 1938 Plymouth
for $425. The sa ie was omitted from the corporate
books altogether. (Ex. 48; R. 103–106, 196–197.)

Mrs. Simansky testified that she did not take it
upon herself to m ake erasures and false entries in the
corporate books and records, but that she was in-
structed to do so by either Duggan or petitioner.
(R. 174–175, 188– 189, 190, 205, 256.) The corporate
books formed the basis of the corporate income tax
returns which we re prepared by a certified public
accountant. (R. 269–273.) The net income actually
earned by the co rporation was over three times the
amount of net inc ome reported. (R. 289–298.)

ARGUMENT

1. Petitioner's contention (Pet. 5–10) is that his
act of signing the income tax returns is colorless and
can not amount t o an attempt to evade taxes unless
accompanied by o ther affirmative acts showing wrong-
ful knowledge and l willfulness. That the signing and
filing of false in come tax returns violates Section
145 (b) (*supra*, p. 5) has been uniformly and re-
peatedly recogniz ed by this Court (*United States* v.
Beacon Brass Co., 344 U. S. 43, 46–47; *Holland* v.
United States, 348 U. S. 121, 125, 139, rehearing
denied, 348 U. S. 932; *Smith* v. *United States*, 348
U. S. 147, 149, 159), and the Courts of Appeals
(*United States* v. *Croessant*, 178 F. 2d 96, 97–98 (C. A.

3d), certiorari denied, 339 U. S. 927; *Gaunt* v. *United States,* 184 F. 2d 284, 288 (C. A. 1st), certiorari denied, 340 U. S. 917, rehearing denied, 340 U. S. 939; *United States* v. *Rosenblum,* 176 F. 2d 321, 329–330 (C. A. 7th), certiorari denied, 338 U. S. 893; *Cave* v. *United States,* 159 F. 2d 464, 466 (C. A. 8th), certiorari denied, 331 U. S. 847, rehearing denied, 332 U. S. 786). One who keeps incomplete business records and files false returns has engaged in "conduct, the likely effect of which would be to mislead or to conceal" (*Spies* v. *United States,* 317 U. S. 492, 499), and which is clearly sufficient to justify the inference of willful tax evasion (*United States* v. *Calderon,* 348 U. S. 160, 165–166. Cf. *Holland* v. *United States, supra,* p. 128; *Smith* v. *United States, supra,* p. 159). In any event, in this case there is an abundance of evidence showing affirmative acts of concealment consisting of side payments in cash, erasures, and false entries. (Statement, *supra,* pp. 5–6.) *Spies* v. *United States, supra.*

While admitting (Pet. 7) "the fraudulent character of the corporate books" and returns, petitioner questions the sufficiency of the evidence to connect him with such fraud. He argues (Pet. 10–11) that the jury could have found that the books and records were falsified exclusively at the direction of Duggan and that petitioner did not know of the understatements. Indeed it could have; but it did not. Before resolving this issue against petitioner the jury heard extensive argument (R. 357–372, 374–380) and ample instructions (R. 388–395)[2] on the subject. As the majority of the court below

[2] See argument 2, *infra,* pp. 8–10.

noted (Pet. 30), the testimony of Mrs. Simansky supported the conclusion that petitioner as well as Duggan had given her instructions to falsify the corporate records. The issue of willfulness was one of fact for the jury, and it was resolved against petitioner by the verdict. *Rutkin* v. *United States*, 343 U. S. 130, 135, rehearing denied, 343 U. S. 952; *Spies* v. *United States*, 317 U. S. 492, 499–500; *Canton* v. *United States*, 226 F. 2d 313, 320 (C. A. 8th), certiorari denied, 350 U. S. 965; *United States* v. *Burdick*, 214 F. 2d 768, 772–773 (C. A. 3d), remanded, 348 U. S. 905, reaffirmed, 221 F. 2d 932, certiorari denied, 350 U. S. 831; *Watts* v. *United States*, 212 F. 2d 275, 278–279 (C. A. 10th), remanded, 348 U. S. 905, reaffirmed, 220 F. 2d 483, certiorari denied, 349 U. S. 939; *Clark* v. *United States*, 211 F. 2d 100, 104 (C. A. 8th), certiorari denied, 348 U. S. 911.

Because of petitioner's intimate association with the conduct of the corporate affairs, his personal handling of many sales resulting in unreported income, and his part in the repeated understatement of sales information to the bookkeeper, the jury could reasonably have found not only that he knowingly acquiesced in but that he actually directed the practice of systematically falsifying the books, and knew the returns were fraudulent when he signed them. The evidence was clearly sufficient to sustain the jury's verdict of guilty.

2. In support of his general complaint that the jury was not adequately instructed as to the defense that Duggan alone engineered the understatements of corporate income, petitioner argues (Pet. 11–15) that certain instructions were erroneous and that his requested instruction on imputed intent should have been given.

The argument is without merit. At the conclusion of the charge, petitioner made no objection to the instructions which he asserts to be erroneous. This failure to object before the trial court should be dispositive of the matter. Rule 30, Federal Rules of Criminal Procedure, *supra*, pp. 2–3. However, the Court of Appeals went on to consider the merits of petitioner's contentions and noted that one sentence [3] taken "out of context might perhaps be interpreted as an erroneous statement" of law. (Pet. 32.) With regard to this sentence and the refused instruction [4] the Court of Appeals said (Pet. 32):

> But considering the sentence in its context, such an interpretation would be so far fetched that we did not think there was any practical probability of misinterpretation by the jury. * * * The charge as a whole impressed us as eminently fair and any possible technical error in it so minor as not to affect substantial rights of the accused. We therefore treated the error, if in fact there was any error at all, as harmless, and disregarded it in accordance with Rule 52 (a) of the Federal Rules of Criminal Pro-

[3] This refers to the following sentence (R. 393):

"The defendant here made the corporate returns along with Duggan and he would be guilty of tax evasion if you find he participated with Duggan in filing a tax return or he knew the tax returns were false with a purpose of evading a substantial amount of the taxes he knew the corporation should pay."

[4] Petitioner requested and the trial court refused (R. 397–398) the following instruction (R. 404):

"18. The knowledge of another employee or officer of Guy's Superservice Garage, Inc. that some of the sales were not included as part of the gross sales appearing in the company's tax returns cannot be imputed to the defendant."

cedure. Error was also pressed on failure of the court to give a certain requested charge, which, while it contained an abstractly correct proposition of law, was so adequately covered in the general charge as to preclude the possibility of prejudice.

With the requirement of knowledge and willfulness (R. 388–393) and petitioner's defense (R. 395) that he "did not know the returns were false" having been so fully covered, the factual issue of willfulness was adequately submitted to the jury. When instructions read as a whole are clear and inform the jury properly of the law and the factual issues in the case, the defendant is not entitled to have the court instruct the jury in any particular words or in the language of his requested instruction. *Armstrong* v. *United States,* 228 F. 2d 764 (C. A. 8th), certiorari denied, 351 U. S. 918; *Samish* v. *United States,* 223 F. 2d 358 (C. A. 9th), certiorari denied, 350 U. S. 848, rehearing denied, 350 U. S. 897; *Jolly* v. *United States,* 229 F. 2d 180 (C. A. 6th), certiorari denied, June 4, 1956; *Watts* v. *United States,* 212 F. 2d 275 (C. A. 10th), remanded, 348 U. S. 905, reaffirmed, 220 F. 2d 483, certiorari denied, 349 U. S. 939; *Gaunt* v. *United States,* 184 F. 2d 284 (C. A. 1st), certiorari denied, 340 U. S. 917, rehearing denied, 340 U. S. 939.

CONCLUSION

The decision of the court below is clearly correct, and no question calling for review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

OSCAR H. DAVIS,
Acting Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
RICHARD B. BUHRMAN,
DICKINSON THATCHER,
Attorneys.

JULY, 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956